IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 775

SCHENLEY DISTILLERS, INC. and JOSEPH S. FINCH AND COMPANY,

Appellants,

v.

JOHN H. BINGLER, United States District Director of Internal Revenue for the Pittsburgh Internal Revenue District,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

ELMER W. MARSHALL,
747 Union Trust Building,
Pittsburgh 19, Pennsylvania
Attorney for Appellants, Schenley Distillers, Inc. and Joseph S. Finch and Company.

THOMAS E. DEWEY,
RALPH T. HEYERFELD,
KENT V. LAUKINGHAL,
JULIAN L. WEBER,
Of Counsel for Appellants, Schenley Distillers, Inc. and Joseph S. Finch and Company.

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Pursuant to Rule 16(3) of the Rules of this Court, the appellants submit this brief in opposition to the appellee's motion to affirm the judgment of the District Court.

We believe that the appellants' Statement as to Jurisdiction thoroughly demonstrates that the questions presented by this appeal are substantial and of urgent importance to both private and public interests. The appellee's motion, being largely a reiteration of contentions disposed of in the Statement, requires little additional discussion.

ARGUMENT.

The appellee, like the Court below, makes no effort to deal with the crucial fact that the injunction sought would not interfere with the collection of revenue. As shown in

the Statement as to Jurisdiction and further discussed at pages 3-7 below, this fact renders Section 7421 inapplicable and the District Court's decision should be reversed on this ground alone.

Further, like the Court below, the appellee fails to recognize that refusal to entertain a suit for injunction is tantamount to depriving the appellants of all constitutional rights in respect of the property now faced with destruction. No matter how unconstitutional the challenged exaction may in fact be, the appellants have no choice but to continue to destroy ever-increasing amounts of their property so long as the appellee is in a position to continue to threaten enforcement. As shown in the Statement as to Jurisdiction and further discussed at pages 8-10 below, the clear decisions of this Court leave no doubt that the Constitution forbids any statutory scheme which thus closes the doors of the Courts to those seeking to assert their constitutional rights.

Unable to deal with the grave legal issues presented by this appeal, the appellee seeks refuge in a series of assertions and innuendoes to the effect that the appellants' plight is due not to the challenged force-out provision but to an alleged infirmity in their business judgment which resulted in "over-production". Indeed, the whole position of the appellee, in substance and effect, is that the appellants do not merit the sympathy of this Court.

In the light of this Court's repeatedly demonstrated insistence that the preservation of constitutional rights does not depend upon such considerations, the issue which the appellee thus seeks to raise would not be relevant even if he were right on his facts.

But the appellee is wrong on his facts, as the record clearly shows. The present over-supply was not due to any "over-production" ascertainable as of the time the

spirits here involved were laid down, eight years ago. The facts as of that time are shown in detail in the Complaint, and those facts leave no doubt that the amounts produced represented a very conservative estimate as to the market which would be available when those spirits matured years later. It was not "over-production", but changes in the Congressional policy as to the rate of the tax on distilled spirits, which reduced the amount of consumption far below that reasonably anticipated when these spirits were laid down.* Nor is there any basis for suggesting that the appellants exercised any less conservative business judgment in this regard that did the industry in general. On the contrary, as the record clearly shows, the appellants produced less than the industry in general, not more.**

The appellants do not in this action challenge the power of the Congress to change the rate of the tax. The appellants do say, however, that the appellee's effort to deprive them of their constitutional rights by reason of the situation which resulted from those changes is unworthy of this Court's consideration.

Section 7421 is not applicable, since the injunction sought would not interfere with the collection of revenue.

The key premise in the District Court's opinion was that the injunction sought would "restrain the collection of a tax".***

As shown in the Statement as to Jurisdiction,† that premise is contrary to the facts. The facts, specifically

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* Complaint, pars. 37-44.

** Seasonwein affidavit of June 8, 1956, par. 9.

*** Statement as to Jurisdiction, App. A, p. 3.

† Pp. 20-25.

set out in the Complaint but not mentioned by the District Court in its opinion, are that the challenged force-out provision has never been considered by the Congress as creating any revenue, it produces no revenue, and at the present time it is actually reducing the revenues and causing hundreds of millions of dollars of losses to the Treasury.

In short, the District Court was guided by the form, not the substance. The result reached is contrary to every decision of this Court bearing on the point.

This Court has never in any way suggested that Section 7421 or any predecessor provision is a blanket prohibition automatically foreclosing judicial scrutiny of the effects of every measure which a statute calls a "tax". On the contrary, this Court has in each case looked to the facts; and in every case where as here it has appeared that the injunction sought would not in fact constitute an interference with the collection of revenue for the usual tax purpose of supporting the government, this Court has held the statutory prohibition inapplicable.*

The appellee's motion adds nothing; it is directed to the form and not the substance. The appellee as noted above makes no effort to face the record facts showing that the injunction sought would not interfere with the collection of revenue. He fails even to mention this Court's clear holdings as to the purpose of Section 7421 and the importance of looking to the facts. He seeks refuge in an irrelevant further elucidation of the mere form of the force-out

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* These cases, discussed at pp. 21-22 of the Statement as to Jurisdiction, include *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932); *Hill* v. *Wallace*, 259 U. S. 44 (1922); *Mulford* v. *Smith*, 307 U. S. 38 (1939); *Lipke* v. *Lederer*, 259 U. S. 557 (1922); *Regal Drug Co.* v. *Wardell*, 260 U. S. 386 (1922); *R. C. Tway Coal Co.* v. *Glenn*, 298 U. S. 238 (1936); *Tovar* v. *Jarecki*, 173 F. 2d 449 (7th Cir. 1949); *Fontenot* v. *Accardo*, 278 Fed. 871 (5th Cir. 1922); *Liberis* v. *Nee*, 10 F. Supp. 336 (N. D. Fla. 1935).

provision and the necessarily corresponding form of the injunction here sought.*

Nor is there any foundation for the appellee's assertion that the appellants are now arguing this point "for the first time".** The Complaint alleged, categorically and in detail, that

(a) the force-out provision has never been considered by the Congress as creating any revenue;

(b) the provision is "not designed to create or protect revenue";

(c) at the present time the threat of exaction of tax at eight years actually reduces the revenue and causes "hundreds of millions of dollars" of revenue losses to the Treasury;

(d) the force-out provision "is a confiscatory penalty on the continued ownership of distilled spirits for aging beyond eight years" and " has no other purpose or effect"; and

(e) the provision is unconstitutional for the reason among others that it requires the appellants to destroy their property in order to avoid a "purported" tax.***

Further, the appellants vigorously contended before the District Court, in their briefs and in argument, that by reason of those facts Section 7421 is not applicable in this case.

The appellants are challenging the force-out provision, not the general scheme of taxation or the duty to pay full tax in respect of these goods in conjunction with the marketing thereof. Likewise without foundation is the appellee's contention that because the general scheme of taxation of distilled spirits produces revenue, it follows that the

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* Motion to Affirm, pp. 7-10.

** Motion to Affirm, p. 7.

*** Complaint, pars. 11, 15, 79-92.

injunction here sought would interfere with the collection of revenue.* The appellants made it perfectly clear in their Complaint that they are not challenging the general scheme of taxation, but only the anachronistic appendage known as the force-out provision.

The facts before this Court leave no doubt that that provision is not a revenue measure. The appellee does not and cannot suggest that the injunction here sought would in any way interfere with the operation of the basic revenue-producing scheme of taxation of distilled spirits. On the contrary, as clearly shown in the Complaint, the injunction would actually increase the revenue; and only by virtue of the injunction will any revenue ever be collected in respect of spirits now facing force-out. Otherwise, they will be destroyed.**

The appellee's reliance upon *United States* v. *Rizzo,* 297 U. S. 530 (1936) and *Hudson* v. *Crenshaw,* 224 F. 2d, 324 (4th Cir. 1955), as holding that "the tax on distilled spirits" is not a penalty, is also beside the point.*** Those cases were directed to the general scheme of taxation, not to the force-out provision. Neither those cases nor any other, so far as we have been able to ascertain, involved the appellants' position that, so far as the applicability of Section 7421 is concerned, the force-out provision is a penalty in the same sense as were the purported taxes in the numerous cases in which this Court has held the statutory prohibition inapplicable because the injunction

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* Motion to Affirm, pp. 8-9.

** Complaint, pars. 13, 15, 79-91. *State* v. *Fifth Judicial District Court,* 36 N. Mex. 151, 9 P. 2d 691 (1932), the only case mentioned by the appellee in this connection (at p. 9 of his Motion) did not even remotely involve any question whether the statute there under consideration did or did not produce revenue.

*** Motion to Affirm, p. 8.

sought would not interfere with the collection of revenue for the support of the government.*

The Courts have full power to scrutinize the facts as to the operation of the force-out provision. There is no basis for the appellee's suggestion that the appellants are raising an issue going to the "wisdom" of the force-out provision, and therefore outside the province of the Courts.**

While the appellants like all taxpayers in the United States look with concern upon the revenue losses which the force-out provision inflicts upon the Treasury, that is of course not the reason why the appellants seek an injunction. The appellants seek an injunction simply because this provision forces the wanton destruction of millions of dollars worth of their property; and they say that on the facts of this case neither Section 7421 nor any doctrine as to separation of powers deprives the Courts of the full power to protect them against that destruction.

Injunction is the only remedy which will protect the appellants against the threatened destruction of their property.

It was shown in the Statement as to Jurisdiction that even if, contrary to the fact, the appellants were seeking to enjoin the collection of a tax, Section 7421 would not be applicable in the special and extraordinary circumstances of this case.***

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* Statement as to Jurisdiction, p. 22.

** Motion to Affirm, pp. 9-10. The cases cited by the appellee, *United States* v. *Jacobs*, 306 U. S. 363 (1939), and *Block* v. *Hirsh*, 256 U. S. 135 (1921), involved challenges to the wisdom of Congress in selecting particular methods to accomplish particular objectives, and have no bearing here.

*** Statement as to Jurisdiction, pp. 24-32.

This Court and the lower courts have consistently and often applied the principle clearly laid down by this Court in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), viz.: that where special and extraordinary circumstances are shown, sufficient to bring a case within "some acknowledged head of equity jurisprudence," a suit for injunction may be maintained. The numerous cases discussed in the Statement as to Jurisdiction* show that the special and extraordinary circumstances which may justify an exception to the statutory provision are as broad and all-inclusive as equity jurisdiction itself; and, as shown in detail in that Statement, there can be no question that that long-established standard is met here.

The appellants cannot pay the exaction. The appellee simply asserts that the *Nut Margarine* standard is not met here,** and he does not even try to deal with the cases. His bland assertion is based solely upon the wholly theoretical idea that the appellants, instead of destroying the millions of gallons of their whiskey now approaching force-out, could pay the huge exaction in respect thereof and then sue for a refund.

The plain fact is that the appellants cannot do this. It is economically out of the question. By no stretch of the imagination could they undertake such a course, knowing as they do that if the constitutional issues should ultimately

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* These cases, discussed at pp. 25-28 of the Statement as to Jurisdiction, include among numerous others *Allen* v. *Regents*, 304 U. S. 439 (1938); *Hill* v. *Wallace*, 259 U. S. 44 (1922); *Lipke* v. *Lederer*, 259 U. S. 557 (1922); *Regal Drug Co.* v. *Wardell*, 260 U. S. 386 (1922); *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110 (1936); *Midwest Haulers* v. *Brady*, 128 F. 2d 496 (6th Cir. 1942); *John M. Hirst & Co.* v. *Gentsch*, 133 F. 2d 247 (6th Cir. 1943); *Mitsukiyo Yoshimura* v. *Alsup*, 167 F. 2d 104 (9th Cir. 1948); *Inland Milling Co.* v. *Huston*, 12 F. Supp. 554 (S. D. Iowa 1935); and *Pocahontas Fuel Co.* v. *Early*, 13 F. Supp. 605 (W. D. Va. 1935).

** Motion to Affirm, p. 3.

be decided against them their losses would be millions of dollars greater than even the outright destruction of the property now. So long as the appellee is in a position to continue to threaten enforcement of this exaction, the appellants will have no choice but to continue to suffer the irreparable damage and destruction, in ever-increasing amounts.

In short, this is precisely the kind of situation which was before this Court in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79 (1901); *Ex parte Young*, 209 U. S. 123 (1908); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920); and *Terrace* v. *Thompson*, 263 U. S. 197 (1923).* Here as in those cases the theoretically available remedy at law can be pursued only at the risk of still further damage so oppressive as necessarily to intimidate litigants from asserting their constitutional rights at all. As this Court has clearly held in those cases, the Constitution forbids such closing of the doors of the Courts and requires that a remedy by way of injunction be made available.

The appellee's assertion that in the present case the peril is attributable to "overproduction" and not to the statute is wholly without foundation as shown at pages 2-3 above. This strained effort to avoid the impact of the above-mentioned crucial decisions of this Court serves merely to demonstrate that the appellee has no answer.

Equally unfounded is the appellee's effort to pose a question in terms of whether the appellants are seeking to enjoin a "constitutional" or an "unconstitutional" exaction. The appellants, having no choice but to continue to destroy ever-increasing amounts of their property under the threat of the force-out provision, can take no comfort from the thought that in a refund suit it may be held some

*The crucial impact of these cases is shown in the Statement as to Jurisdiction, pp. 29-32.

years from now that the force-out provision is unconstitutional. Such a decision would not bring back the property now being destroyed, and the appellants would have no remedy in respect thereof against anyone. No such Hobson's choice was even remotely involved in any of the cases cited by the appellee in this connection.*

Speed is essential, not for its own sake but to prevent destruction. In the foregoing circumstances, the appellants' prayer for speedy injunctive relief is obviously not, as suggested by the appellee, a case of speed for speed's sake.** In the Pittsburgh Internal Revenue District alone, the appellants were forced to destroy more than $500,000 worth of their property in the first six months after this Complaint was filed, and ever-increasing destruction is being suffered every day.*** The appellee does not and cannot question that this destruction, which will go on for years if the appellants are relegated to a suit for refund, can be cut short once and for all in this action for injunction.

The appellee's "laches" contention is unfounded. There is no warrant for the appellee's contentions based upon speculations as to what might have happened if the appellants had several years ago gone to the Courts instead of to the Congress.† The appellee does not and of course could not even intimate that he has been hurt by this alleged

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* *Brasier* v. *United States*, 229 F. 2d 176 (10th Cir. 1955), cert. den. 351 U. S. 925; *United Gas Co.* v. *R. R. Commission*, 278 U. S. 300 (1929); *Doa[illegible]* v. *Osborn*, 240 U. S. 118 (1916); and *State Railroad Tax Cases*, 92 U. S. 575 (1875), cited at p. 6 of the Motion to Affirm.

** Motion to Affirm, p. 4. In *California* v. *Latimer*, 305 U. S. 255 (1938), the only case cited by the appellee on this point, no threatened destruction of property or other circumstances justifying equitable relief were alleged.

*** Seasonwein affidavit of June 22, 1956.

† Motion to Affirm, pp. 4-5.

delay; and that in itself is a conclusive answer to his contention.

Aside from that, however, it may be noted that the appellants acted entirely reasonably in going first to the Congress instead of to the Courts, at a time when the latter action might have been deemed to be premature. As the Complaint shows,* the Congress had on every earlier occasion taken action to provide relief when circumstances arose under which the force-out provision became a serious burden on the distillers. And the appellants did not, as stated by the appellee, merely entertain a "hope" for Congressional action.** They vigorously pursued the matter before the Congress, and were active there with respect to no fewer than six separate measures designed to provide relief from this intolerable situation.***

The government simply does not want to meet these issues at all. It is now perfectly clear that the government's real concern is not with any question whether the constitutional issues shall be litigated in an injunction suit or in a refund suit. The government simply does not want to meet these issues in any court anywhere.

Following the decision of the Court below, the appellants did file, in that same Court, a suit for refund in respect of a relatively small number of gallons of whiskey as to which they had paid the exaction at eight years instead of destroying the whiskey.† In that complaint

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* Pars. 83-89.

** Motion to Affirm, p. 5.

*** H. R. 7651, 82nd Cong., 2nd Sess.; H. R. 7735, 82nd Cong., 2nd Sess.; H. R. 1215, 83rd Cong., 1st Sess.; H. R. 5407, 83rd Cong., 1st Sess.; H. R. 263, 84th Cong., 1st Sess.; H. R. 5367, 84th Cong., 1st Sess. Copies of these bills and certain Congressional Committee reports with respect thereto were submitted to the District Court by the appellee in conjunction with his brief before that Court.

† *Schenley Distillers, Inc. and Joseph S. Finch and Company* v. *United States,* Civil No. 15415, U. S. D. C., W. D. Pa.

the appellants set forth substantially the same facts, with respect to the destructive impact of the force-out provision and the absence of any revenue or other public justification therefor, as are set out in the Complaint in this present case. They sought to raise among others substantially the same basic constitutional issue involved in this present case, viz.: whether a statutory provision which inflicts such destruction of private property without any revenue or other public justification is constitutional.

That is the very issue which the government is here contending could have been or can be adequately litigated in a refund suit. The government in that refund suit, far from meeting that issue, has moved to strike every allegation relating to whiskey which had to be destroyed, and every allegation as to the absence of any revenue or other public justification for that destruction. The government's position in effect is that destruction is irrelevant in a suit for refund of taxes paid on whiskey which was not destroyed.

In short, the government's position is that the appellants are not entitled to litigate before any forum the grave question whether under the Constitution of the United States they must continue to suffer the wanton destruction of their property now being inflicted upon them by the force-out provision.

We respectfully submit that however reluctant the government may be to litigate this issue, the appellants are entitled to be heard by the Courts. We further respectfully submit that the appellants are entitled to be heard in this action for injunction, the only remedy which can cut short the constantly accumulating destruction of their property. Relegation of the appellants to a suit for refund would be nothing more nor less than a warrant for the continued destruction of their property for years to come.

Conclusion.

The questions presented on this appeal are of the gravest importance to both public and private interests, and we earnestly request that probable jurisdiction be noted.

Respectfully submitted,

ELDER W. MARSHALL,
747 Union Trust Building,
Pittsburgh 19, Pennsylvania,
Attorney for Appellants, Schenley Distillers, Inc. and Joseph S. Finch and Company.

THOMAS E. DEWEY,
RALPH T. HEYMSFELD,
KENT V. LUKINGBEAL,
JULIAN L. WEBER,
Of Counsel for Appellants,
Schenley Distillers, Inc. and
Joseph S. Finch and Company.

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